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Supreme Court of the United States.

OCTOBER TERM, 1948.

No.

ANNA C. McCARTHY

v.

CITY OF BOSTON.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

This brief is submitted pursuant to the provisions of paragraph 3 of Rule 7 in opposition to the appellee's motion to dismiss or affirm. That motion is based upon the proposition that the court is without jurisdiction, which is elaborated in the appellee's statement opposing jurisdiction. The appellants' position that the court has jurisdiction is set forth in their jurisdictional statement. An attempt has been made not to duplicate here what appears in that statement. Consequently this brief is in the nature of a reply to the appellee's statement opposing jurisdiction.

Statement of the Case.

The case is a bill in equity brought pursuant to Massachusetts General Laws (Ter. Ed.) c. 214, § 3 (11), to enforce a municipal trust and prevent an alleged projected breach of that trust. The theory of the petition is that

the appellee holds property under trusts declared in the will and codicil of George Francis Parkman; that those trusts require the use of the trust property for the maintenance and improvement of Boston Common (title to which is also held by the appellee) for the uses to which it was put at the date of the will; that the City, pursuant to the supposed authorization contained in Massachusetts St. 1946, c. 294, proposes to divert the Common from those uses by turning nearly half of it into an underground garage, and consequently to commit a breach of trust. The appellee does not deny that it holds the Parkman fund in trust. It has, however, maintained the position that the trust imposes on it no obligation to continue the Common in the uses referred to in Mr. Parkman's will and that the construction of the garage, all as provided in the statute, will not constitute a breach of trust.

The Parkman will (Exhibit 28) by paragraph 43 devised the residue of the estate to the City of Boston and by a codicil provided that the income of the residuary fund should be applied by the City "to the maintenance and improvement of the Common and the Parks now existing . . ." It was further provided in paragraph 43:

> "This bequest is made to the City of Boston in the hope and expectation that the Boston Common shall never be either in whole or in part diverted from its present use as a public park for the benefit and enjoyment of its citizens."

There were further provisions that the City should notify the executors within a stated period of "its acceptance or rejection of this bequest" and there were gifts over in the event the City should "not consider it expedient to accept the bequest for the above purposes."

St. 1946, c. 294 (which is copied in full in appellants' jurisdictional statement), purports to authorize the City

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to lease a substantial portion of Boston Common to a private corporation for the construction of an underground garage the construction of which, as found by the trial judge, will take some three years, during which period the public will be excluded from a substantial part of the Common and following which it will still be excluded from those portions which are to be used as approaches to the garage. In paragraph 5 of the petition the appellants allege that the appellee proposes to use the Common in such fashion as to derogate from the obligations of the Parkman trust. In its answer to this paragraph the appellee "admits that it intends to exercise the authority conferred upon it by St. 1946, c. 294, but says that the terms of the contract and lease provided for by that statute have not yet been determined as agreed upon between the parties. The Respondent [appellee] denies that the execution of said contract and lease will in any way impair the obligations imposed upon the City by its acceptance of the Parkman gift."

The issue presented, therefore, was whether action by the City taken under the 1946 statute would constitute a breach of an admitted trust.

The case was tried with two companion cases, one known as the *Lowell* case, which is not before this court, and the other known as the *Pierce* case, in which an appeal has been taken to this court. The trial judge found

> "All three bills are brought as a result of the City's intention to exercise the authority granted by Chapter 294 of the acts of 1946"

and that

> "The City . . . is accepting the authority granted by said act and intends to exercise and assert such authority."

He further found the terms of the Parkman will and the establishment of the testamentary trust with the City as the trustee. He likewise found the facts with reference to the use to which the Common has been put for three centuries, and concluded:

> "Under these circumstances and also because a constitutional question is presented, I reserve and report these cases for the consideration and determination of the Supreme Judicial Court . . . such decree to be entered as justice and equity may require."

The Supreme Judicial Court decided all three cases in one opinion. After a description of the cases the court proceeded to a lengthy examination of the state of the title under which the City held the Common. It concluded that title to the Common was not held by the City in trust. With reference to the trust under the Parkman will, the court (pages 632-635 of the Opinion) concluded that, although a trust was in fact created, as matter of construction the provision that the bequest was made

> "in the hope and expectation that the Boston Common shall never either in whole or in part be diverted from its present use as a Public Park for the benefit and enjoyment of its citizens"

was not mandatory and did not impose

> "a limitation or condition which constituted an integral and essential part of the trust" (Opinion, p. 635, Mass. Adv. Sh. 1948).

It concluded:

> "We are of opinion that the proposed use of these areas will not constitute a breach of any mandatory

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> and essential provision as distinguished from one of 'hope and expectation' such as contained in the Parkman trust'' (p. 635)*

and ordered the entry of a decree dismissing the bill, and such decree was duly entered in the Superior Court. The present appeal followed.

The Appellee's Position.

In arguing against the court's jurisdiction the appellee asserts that since the state court ordered the bill dismissed solely on the ground that the trust relied upon by the appellants was not made out, it did not in any way pass upon the validity of St. 1946, c. 294, and that since the pertinent appellate jurisdiction of this court is limited to cases

> ''where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity,''

the appeal will not lie, since there was no decision in favour of the validity of the statute.

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*This sentence was changed by the court after the publication of the Advance Sheets. Unfortunately, we quoted the sentence as it originally appeared at page 7 of our jurisdictional statement. We were advised of the change by the Reporter of Decisions after the jurisdictional statement had been filed. The change is verbal only, and there is no change of substance or meaning.

Points and Authorities.

THE DECISION OF THE SUPREME JUDICIAL COURT WAS IN FAVOUR OF THE VALIDITY OF THE STATUTE.

The fundamental vice in the appellee's position is that it assumes that the validity of the 1946 statute was not the focal point of the case but was incidental merely. This entirely overlooks the fact, which is the threshhold of the case, that without the statute the City neither could nor would embark upon the particular project which it admitted an intention to carry out.

The suit is in essence one to prevent a breach of trust through the construction of a garage in the Common. There could be no doubt that, in so far as it had power to do so, the legislature had attempted to authorize this action, whether it was a breach of trust or was not. If it would not constitute a breach of trust, the legislature would not be deprived of power to enact the statute by the prohibition of the contract clause of the Constitution. If the proposed action will constitute a breach of trust, then to that extent the statute must fall within the condemnation of the contract clause and was beyond the power of the legislature. The action which the City admitted it proposed to take in its answer was only to exercise the authority granted to it by the statute. Without the statute there could be and would be no garage. As far as the contract clause is concerned, there can be no dispute that a statute authorizing a breach of an existing trust would impair the obligation of a contract. As a consequence, the question of whether the action authorized by the statute and proposed to be undertaken pursuant to that authorization would or would not constitute a breach of trust would determine and would alone determine whether the statute was valid or invalid.

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We do not understand that the appellee denies the proposition developed in our jurisdictional statement that the question of whether a contract right exists which is impaired by the statute constitutes a question for this court. To maintain its position the appellee must establish that the validity or invalidity of the statute was not passed upon by the lower court or implicit in its decree. But where the proposed action which is the sole subject matter of the suit depends entirely upon a statutory authorization, is initiated by the statute, and all steps of which are prescribed by the statute, it is impossible to say that a decree denying an injunction against that action does not involve determination that the statute is valid.

The establishment of the validity of the statute was an essential part of the City's case in the entire litigation, and the court below held that the statute was valid. It is true that it did so in its consideration of the Lowell bill, but the City needed the authority granted by the statute quite as much in its capacity as trustee as it did in its capacity simply as a municipality. If the statute was not valid for any reason, the City could not proceed with the garage project. The plaintiffs in the three cases asserted several other grounds of invalidity as well as the prohibition of the contract clause in the over-all litigation and the court below disposed of all of these other objections and ruled that the statute was valid. The court said in so many words: "We have decided that the statute is valid" (1948 Adv. Sh. p. 635) and without that decision the appellee could not have its garage, trust or no trust. As far as the case at bar is concerned, it is true that the asserted invalidity based upon the contract clause could not come into play until it appeared that there was a contract the obligation of which could be impaired, but if there was such a contract there was no issue between the parties that the statute would impair it.

The authorities are clear that failure of a state court specifically to adjudge a statute claimed to impair the obligation of contract to be valid does not oust this court of jurisdiction. This court will itself determine whether the necessary effect of the state court's decision is to uphold the statute and consequently, in the language of the jurisdictional grant, is in favour of the statute.

McCullough v. *Virginia*, 172 U.S. 102, 122:

> "Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

A holding by implication gives jurisdiction quite as fully as an explicit one.

Long Sault Development Co. v. *Call*, 242 U.S. 272, 277:

> ". . . If it did not give effect to that act, either expressly or by implication, this court is without jurisdiction to review its decision, for the reason that the provisions of the Constitution of the United States for the protection of contract rights are directed only against the impairment of them by constitutions or laws adopted or passed subsequent to the date of the contract from which such rights spring, and do not reach decisions of courts construing constitutions or laws which were in effect when the contract was entered into, as has been held by a long line of decisions extending from *Knox* v. *Exchange Bank*, 12 Wall. 379,

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to *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632.

"In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act."

Columbia Railway, Gas & Electric Co. v. *South Carolina*, 261 U.S. 236, 245:

"But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches."

Honeyman v. *Hanan*, 300 U.S. 14, 18:

"As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

Walsh v. *Columbus &c. Railroad Co.*, 176 U.S. 469, 475:

"We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation, it is for this court to determine whether such contract existed, as well as the question whether the subsequent legislation has impaired it."

Detroit United Railway v. *Michigan*, 242 U.S. 238, 247:

> "But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."

See also *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U.S. 561, 580, 581.

In the case at bar the lower court did specifically hold the statute valid. It considered the contract clause argument only to the extent of ruling that there was no contract, but it did make that ruling and it did hold the statute to be within the legislative competence. It follows that the decision in favour of the validity of the statute was both implicit and explicit. Undoubtedly, if the Lowell case had not been before it, the court would not have used the language which appears on pages 628-632 of its opinion, but nevertheless, if the statute was invalid, there could be no garage.

A case which is closely applicable is

Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U.S. 164.

That was a suit by the City to enjoin the railway company from constructing and operating tracks under a City ordinance. Subsequent to the passage of that ordinance a later one had been passed which purported to repeal it. The railway company insisted that the first ordinance gave it a contract right and that the repeal of the first by the

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second ordinance impaired that contract right. The state court held that the first ordinance was subject to a condition and never took effect; consequently it did not come to consider whether the second ordinance impaired the obligation of any contract. On writ of error to this court the City moved to dismiss on the ground that the state court had given no effect to the second ordinance, and consequently that the court was without jurisdiction. The court held, however, that it did have jurisdiction and stated that

> ". . . where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee" (p. 170).

Having decided that the court had jurisdiction, the court, however, went on to decide that the construction placed on the first ordinance by the state court was correct and consequently affirmed the judgment.

The situation thus presented is very similar to that in case at bar. The Louisiana court never came to the question of whether the second ordinance impaired a right of contract simply because it determined that no such contract right existed. So here the Massachusetts court never came to consider whether St. 1946, c. 294, violated the contract clause, because it construed the trust as not giving

the contract right asserted. In the cited case New Orleans was endeavouring to act under the provisions of the second ordinance. In the case at bar Boston is proposing to act under St. 1946, c. 294, and patently cannot take the desired action except by reason of that statute. The Louisiana court held that New Orleans might take the action it proposed. The Massachusetts court has held that Boston may take the action it projects. The parallel between the cases is complete. This is further pointed out by a later statement of the court (at page 171):

> "In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described."

So also here the object of the suit was to prevent the City from carrying out the project specifically authorized by St. 1946, c. 294.

There is no room for doubt that there is a clear conflict between the statute and the trust which we assert. The statute is upheld quite as fully by a decision based on the proposition that no contract obligation existed as it would be if based upon the proposition that the provisions of the statute did not impair a contract right found to exist. Whether there has been impairment or not must be determined by this court, and the state court cannot tie the hands of the court by the fashion in which it makes its decision.

Atlantic Coastline Railroad Co. v. *Phillips*, 332 U.S. 168, 170:

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Consti-

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tution, and cannot be foreclosed by a State Court's determination whether there was a contract or what were its obligations."

The case of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, cited by the appellee in its statement opposing jurisdiction, supports our contention. In that case the defendant in error sought to have the appeal dismissed on the footing that the injury, if any, to the Bridge Proprietors resulted only from the construction placed by the state court on the second statute, but this court pointed out that the construction was not of the second but was of the first statute.

"But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was *not* construed. No doubt is entertained by this court, none could have been entertained by the State court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that

of 1860, in order to determine whether the latter was valid or invalid" (pp. 144-145).

The parallel between the two cases is close. In the case at bar the 1946 statute just as obviously impaired the obligation of contract, if one existed, as the 1860 statute impaired the obligation alleged to have been created by the 1790 statute. It is also significant that this court affirmed the judgment of the lower court in the cited case and adopted its construction of the 1790 statute, but it nevertheless held that it had jurisdiction over the appeal.

The appellee's suggested distinction that the erection of a bridge requires justification by way of a franchise whereas the construction of a garage is *prima facie* lawful is quite without merit. Turning the public out of a park and converting it into a garage is not *prima facie* lawful. Boston needs the authority of St. 1946, c. 294, to accomplish this quite as much as the Hoboken Company needed a franchise to build its bridge. The appellee certainly recognized this by its prayers in the Pierce and Lowell cases for a declaration that the statute was valid. It is immaterial that it failed to include such a prayer in the case at bar, the absence of power to change the park into a garage without statutory authorization remained the same.

THE APPELLANTS HAVE PROPERLY PRESENTED THEIR POINT.

The appellee's attack on the assignments of error is without merit. In its statement opposing jurisdiction appellee attempts to show that the assignments of error do not properly raise the question. Its argument, however, on this point is entirely subsidiary to its principal argument that the court below did not rule in favour of the statute. The appellee quite properly admits that, where a failure to rule that a contract right exists necessarily

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gives effect to the statute in question, it constitutes a decision in favour of the statute. As has already been pointed out, the decision of the Massachusetts court that action under St. 1946, c. 294, would not entail a breach of trust necessarily constituted a decision in favour of the validity of the statute. The question of the existence or non-existence of the trust and of its construction was a question of law. Under the cases already cited, the decision of that question is clearly one for this court, and the failure to make a proper ruling on that question by the Massachusetts court constitutes a decision by that court in favour of the validity of statute and is properly subject to review upon the present appeal.

Where it is asserted that a statute violates the contract clause there are two possible defenses open, either that there is no contract the obligation of which the statute impairs or that the obligation of an admitted contract does not come within the sweep of the statute. Whichever is chosen, this court has jurisdiction to review if the proposed action pursuant to the statute is permitted. But where the first alternative is selected—as it was here—the appellants' assignments of error must necessarily be for failure to rule. It may be true in metaphysics that error in failing to rule that a statute is invalid is not the equivalent of error in ruling that it is valid, but law cases are intensely practical affairs and a litigant must take his case as he finds it. If an inferior court sees fit to decide a case on the footing that no contract exists, it is ridiculous to say that an appellant fails to show jurisdiction when he assigns as error the precise error which the inferior court has committed—failure to rule that a statute which is essential to the proposed action of the appellee and which confessedly impairs the obligation of the asserted contract is invalid.

EVEN IF THE APPEAL WERE NOT PROPERLY BEFORE THE COURT, IT SHOULD TAKE THE CASE AS UPON CERTIORARI.

Paragraph (c) of U.S. Code, Title 28, § 344, provides,

> "If an appeal be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the appeal was allowed . . ."

Even if the appellee's position in its statement opposing jurisdiction were correct, this paragraph would apply and the court should, we submit, consider the case on certiorari. The appellee's argument is based wholly upon the proposition that the decision below did not constitute one in favour of the validity of the statute. It does not question that the validity of the statute was drawn in question in the court below on the ground of being repugnant to the contract clause of the Constitution. Paragraph (b) of § 344, which gives power to the court to act on certiorari, does not require that there be a decision in favour of the validity of the statute. The pertinent language in paragraph (b) is: "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; . . ." The further words appearing in paragraph (a), "and the decision is in favor of its validity," are omitted from paragraph (b). Therefore there can be no question that it is competent for this court to act on certiorari and that a petition for certiorari would have been an appropriate remedy for the appellants.

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A recent case where the court acted under paragraph (c) after holding that the appeal could not lie is *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182.

The substantial grounds on which we urge this court to review the decision of the Massachusetts court are set forth in our jurisdictional statement. There is no occasion to repeat them here, but we urge them on the court as ample reasons why the court should consider the case on certiorari in the event that it should not do so on appeal.

Respectfully submitted,

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